Law Council
OF AUSTRALIA

Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020

Senate Standing Committees on Education and Employment

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2021 Executive as at 1 January 2021 are:

- Dr Jacoba Brasch QC, President
- Mr Tass Liveris, President-Elect
- Mr Ross Drinnan, Treasurer
- Mr Luke Murphy, Executive Member
- Mr Greg McIntyre SC, Executive Member
- Ms Caroline Counsel, Executive Member

The Chief Executive Officer of the Law Council is Mr Michael Tidball. The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council is grateful contributions of the following organisations and committees in the preparation of this submission:

- Industrial Law Committee of the Law Council's Federal Litigation and Dispute Resolution Section;
- Law Society of New South Wales;
- Law Institute of Victoria; and
- Queensland Law Society.

Introduction

1. The Law Council of Australia (**Law Council**) welcomes the opportunity to provide its views on the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 (**the Bill**) to the Senate Standing Committees on Education and Employment (**the Committee**).

2. It is some time since the *Fair Work Act 2009* (Cth) (**Fair Work Act**) was enacted, and while there have been amendments made since then, it can be accepted that the legislative regime in various ways can be improved.

3. Further, given the current circumstances arising from the COVID-19 pandemic, amendments that assist to provide greater capacity to create jobs and improve the economy are to be encouraged.

4. However, care must be taken to ensure that in the desire to promote economic growth, conditions of employment for employees, including job security, are not unnecessarily eroded. As always, when considering employment law, it is necessary to strive for a fair balance between the rights of employers and employees.

5. An important aspect of the Fair Work Act is to establish mechanisms to resolve disputes that arise in the workplace. If not resolved, disputes can cause disruption and/or reduced productivity. The Fair Work Commission (**FWC**) has various powers given to it in that regard. Its members have expertise in the field of industrial relations and in the resolution of disputes. They are capable of acting as the 'umpire' and ruling on how disputes should be resolved in a manner that is fair in all the circumstances. As a broad observation, the Fair Work Act and the Bill could make more use of the FWC's ability to exercise decision-making powers to resolve disputes where they cannot be resolved by discussion. Such powers (referred to as 'arbitration') when exercised allow an outlet for dissatisfaction that could otherwise lead to industrial action or otherwise reduce productivity.

The right to representation in the FWC

6. The Explanatory Memorandum accompanying the Bill states that the new provisions which would empower the FWC to conciliate small claims proceedings 'do not affect existing restrictions on representation by lawyers and paid agents in matters before the FWC in section 596 [of the Fair Work Act]'.[1] The Law Council's longstanding position is that section 596 of the Fair Work Act, which requires a person to seek leave to be represented by a lawyer or paid agent in a matter before the FWC, should be repealed. The Law Council suggests that this should occur during the current industrial relations reform process, to provide parties appearing before the FWC in all matters, including small claims proceedings, with an automatic right to legal representation.

7. The Law Council's experience is that, rather than acting as an impediment to the swift and efficient resolution of employment related claims, legal representation allows for the prompt identification of the relevant facts and legal questions to be determined, which supports the proper administration of justice. Self-represented parties often arrive underprepared and overwhelmed. This can result in delays in pre-trial procedures, increased time spent at hearing discussing irrelevant matters, a greater number of adjournments, and difficulties in advancing settlement

[1] Explanatory memorandum, Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020, [360].

discussions. For these reasons, the Law Council does not agree that lawyers should be excluded from proceedings before the FWC or have their involvement limited.

8. The recent decision of the Full Bench of the FWC in which it was determined that an employer whose management team had no relevant training or experience in advocacy or legal analysis could not be represented by a lawyer reinforces the need for reform in this area.[2]

Schedule 1 – Casual employees

Overview

9. Proposed Division 4A seeks to introduce a statutory definition of 'casual employee'. An employee will be a casual employee if they accept an offer of employment that makes no firm advance commitment to continuing and indefinite work according to an agreed pattern of work for the employee. Only a limited set of criteria may be considered by a court in determining whether an advance commitment has been made and post contractual conduct is to be disregarded.

10. In respect of former and current employees who have made a claim or may make a claim for National Employment Standards (**NES**) entitlements accrued because of a misclassification as a casual employee, a court may reduce the claim amount by amounts by or in proportion to any identifiable casual loading or extra payments made to the employee because they were employed as a casual employee. These changes are intended to address the so-called 'double dipping' claims raised in the *WorkPac Pty Ltd v Skene* (**Skene**) and *WorkPac Pty Ltd v Rossato* (**Rossato**) decisions.[3] In that regard the Bill expressly intends to have retrospective effect.

11. Complementing the new statutory definition is the introduction of a statutory obligation for employers to offer a casual employee conversion to part-time or full-time employment after 12 months' employment, where for at least six months of that period, the employee has worked a regular pattern of hours on an ongoing basis. For casual employees not taking up the offer, a residual statutory right for casual employees to request conversion every six months provided they have met the criteria for an offer in that period is also included.

12. The FWC is granted jurisdiction to conciliate disputes about the operation of the proposed Division 4A after discussions about the dispute at the workplace level have not resolved the dispute. Employers and employees may 'contract out' of the FWC's jurisdiction to conciliate disputes if they agree on an alternative dispute resolution procedure. If the parties cannot reach agreement in conciliation the FWC is not given the power to determine the dispute.

13. Schedule 1 of the Bill also proposes to amend Division 12 of Part 2-2 of the Fair Work Act by requiring a Casual Employment Information Statement to be published by the FWC and given by employers to casual employees, containing information about the statutory rights and obligations applicable to casual work. Further, the definition of 'long term casual employee' is replaced by the concept of a regular casual employee for the purposes of requesting flexible working arrangements and access to parental leave.

[2] *Wellparks Holdings Pty Ltd t/as ERGT Australia v Mr Kevin Govender* [2021] FWCFB 268.
[3] *WorkPac Pty Ltd v Skene* [2018] FCAFC 131; *WorkPac Pty Ltd v Rossato* [2020] FCAFC 84.

Schedule 1 and Schedule 7 Division 2 – General comments

Definition of casual employee

14. The Fair Work Act does not currently define the term 'casual employee'. In the past a casual employee was considered by some to be a person employed as such. However recent decisions have confirmed that is not [4]the true meaning of the expression. Decisions such as *Skene* and *Rossato* have developed a meaning that has regard to the totality of the employment relationship, which is something that can change over time.

15. This 'common law' meaning has created a situation where employees who are paid a base rate of pay plus casual loading have been held not to be casuals in fact – broadly because their employment is not uncertain or irregular. The consequence is that as a matter of law they have the entitlements of ongoing employees, such as the right to paid annual leave.

16. Employers say the current lack of definition means that for some employees there is a lack of certainty as to whether they are a casual or not, leaving them uncertain as to whether they should be paying a casual loading or paying the employee the entitlements of permanent employees.

17. As well as seeking certainty, employers would prefer a system where an employee who commences employment as a casual remains a casual unless there is an express decision to alter their status.

18. Employees say that that it is appropriate that they receive the benefits of permanent employment if they are not in fact engaged on a casual basis. Further if their employment commences on a casual basis, but their hours become fixed and ongoing then their status should reflect that reality.

19. The Law Council accepts that there are benefits in greater certainty that come with a statutory definition.

20. The Law Council however raises the following matters for consideration:

    (a) The definition of casual employee as proposed in the Bill may be open to manipulation by employers, since it is affected by how the offer of employment is phrased. A person will be a casual employee under the definition where the offer, including an offer for a regular pattern of hours, bears a statement to the effect that the employer 'makes no firm advance commitment to continuing and indefinite work according to an agreed pattern of work'.[5] Consideration might be given to allowing the Court to have regard to matters beyond those set out in subsection 15A(2) of the Bill to determine the true nature of the offer of employment.

    (b) An allied consideration is the potential to add a provision in the Bill creating a civil remedy penalty for a 'sham' casual employment offer.

    (c) Requiring a court to determine the issue based only on what was said at the point the offer is made deprives the court of the capacity to examine whether the categorisation remains correct at a later point in time. That drafting technique creates certainty, which can be considered a good thing. However, it

[4] *WorkPac Pty Ltd v Skene* [2018] FCAFC 131; *WorkPac Pty Ltd v Rossato* [2020] FCAFC 84.
[5] Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 s 15A(1)(a).

also means that an employee whose employment has become fixed and ongoing, including possibly only shortly after employment commences, remains unable to access the benefits of permanent employment, at least until 'casual conversion', where that applies.

Retrospective effect of change in definition

21. The Law Council notes that pursuant to Schedule 7 of the Bill, the proposed definition of casual employment is to have retrospective effect, other than in respect of those who have had a binding decision made by a court that they are not a casual employee, or who were casuals and have converted to ongoing employment by the time the Bill becomes law.

22. The Law Council considers a key principle of the rule of law to be that the 'law must be both readily known and available, and certain and clear'.[6] As such, the Law Council generally opposes laws that have retrospective effect.

23. While such a definition of casual employment will create greater certainty for employers, it will have the effect of altering the status of some current employees from ongoing employees (entitled to annual leave and the like), to casual employees based on what was the offer made to them in the past.

24. Further, by only maintaining the rights of those who have achieved a binding decision of a Court, it will have the effect of removing the rights of employees who have claims before a Court that have not yet been determined, without any compensation for the legal costs they have incurred.

Proposed subsections 117(4) and 119(3)

25. The Law Council does not support proposed new subsections 117(4) and 119(3) in the Bill. These insertions would exclude a period of casual employment from the calculation of notice or redundancy pay. Such entitlements are not paid to casual employees. However, they are paid to employees who were casual and have become permanent. Currently, such employees are able to count their period of casual employment towards the calculation of these entitlements. This change would effectively reduce existing rights of ongoing employees who were previously casuals. It is not clear why such a reduction in existing entitlements is considered appropriate.

Casual conversion

26. In relation to subdivision B of Schedule 1 of the Bill, the Law Council welcomes the proposed move to create a universal right to casual conversion. However, three issues warrant consideration and possible amendment:

    (a) The Bill provides that an employer is not required to make an offer of casual conversion on several 'reasonable grounds', including where 'the hours of work which are required to be performed will be significantly reduced in that period'.[7] It is unclear how this 'expectation' can be tested. Questions arise as to whether it would permit unreasonable and unfounded predictions. This

[6] Law Council of Australia, Rule of Law Principles (Policy Statement, March 2011) 2 <https://www.lawcouncil.asn.au/docs/f13561ed-cb39-e711-93fb-005056be13b5/1103-Policy-Statement-Rule-of-Law-Principles.pdf>.
[7] [7] Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 s 66C(2).

would be of less concern if recourse was given to a casual employee to be able to test these assertions.

(b) The conversion right would be strengthened by an ability to have a dispute about conversion arbitrated. Under the Bill if the parties are unable to resolve a dispute about a rejected casual conversion request, then it can be referred to the FWC for conciliation. However, if the parties are unable to resolve the matter through mediation or conciliation, a binding decision can only be made where both parties agree to arbitration.[8] In practice, this may permit an employer to refuse a request for casual conversion on unreasonable grounds. This is an example of a point made above in the introduction – there is available an expert 'umpire' (the FWC) which could be given the power to determine a dispute in a fair manner where the parties cannot agree.

(c) Pursuant to proposed section 66F, an employee can request to convert, but only once, and not if they have previously refused an offer. There does not seem to be any obvious reason why an employee should not be entitled to make such a request at a later time (for example, when their personal circumstances have changed) even if they previously rejected an offer. A right to make a request after each 12-month period of employment could be added by a minor amendment to proposed section 66B.

Specific comments on Schedule 1

Statutory definition of casual employee – proposed s15A

27. The Law Council suggests that the concept of a 'firm advance commitment' at proposed subsection 15A(3) might benefit from being defined, with the idea that it is something which is so clear and certain that it is capable of being accepted and creating a contractual obligation.

28. If an employee asserts a firm commitment was made, it is not clear whether all or only some of the criteria need to be met (or in fact the relationship between a positive or negative outcome in respect of the criteria and the nature of the offer).

Right to convert casual employment – proposed subdivisions B and C

29. The Law Council submits that the offer that might be made by an employer under proposed subsection 66B(2) should be limited to one that can be accepted by an employee 'without significant adjustment' to the casual employee's existing pattern of work. This is consistent with the pre-requisites set out in subsection 66B(1).

30. Further, there appears to be a drafting error in proposed paragraph 66C(4)(c) which reads: 'The notice must – give the notice to the employee…'.

Subdivision D – other amendments

31. The reference in proposed paragraph 66K(d) to an employee's contract of employment may cause difficulties. It is likely that an employee's contract of employment will need to be amended following conversion as the existing employment contract will be focused on the employment of the person as a casual and not as a full time or part time employee. The Law Council queries whether section 66K is intending to statutorily impose a new set of conditions into the employment contract, beyond the extent to which the Fair Work Act and NES

[8] Ibid s 66M(4).

entitlements related to full time and part time employees are imposed into the respective contracts of employment.

32. The Law Council suggests that proposed section 66K should include the phrase 'as the case may be' after the words 'a full-time employee or part-time employee' to avoid drafting confusion about which type of employment is being referred to for the purposes of the subsequent subsections.

Casual Employment Information Statement

33. The concepts of 'without significant adjustment' and 'full time hours' as used in proposed subdivisions B and C could be made clearer to avoid disputes, potentially as part of FWC guidelines about the conversion process or in the Casual Employment Information Statement. Notably, the concept of 'full time hours' is described further in subsection 66B(3), however, only for award/agreement free employees.

34. The Law Council notes that while an updated Casual Employment Information Statement must be published by the FWC in the Gazette, there does not appear to be a requirement for employers to provide the updated Casual Employment Information Statement to existing casual employees.

35. Potentially, the Casual Employment Information Statement could also include information about how to obtain updated statements in the mandatory criteria set out in proposed subsection 125A(3).

'Double dipping' sections - proposed section 545A

36. The matters set out in proposed subsection 545A(1) as 'triggers' for a court to be required to reduce a claim for relevant entitlements by a loading amount may not be able to be objectively determined enough to provide for the expected large volume of cases seeking recovery of entitlements to come within the scope of the court ordered reduction as required by subsection 545A(2). This is because the concepts of 'described as casual employment' and 'identifiable amount' might be arguable, based on considerations taken into account in *Rossato*. The Law Council submits that further defined and broader language could be used to ensure a majority of '*Rossato*-like' cases come within the scope of proposed section 545A.

37. The Law Council notes that the drafting of proposed paragraph 545A(3)(b) has difficulties. Namely, it refers to 'such a term' in reference to the term described in paragraph 545A(3)(a), but then goes on to operate in respect of a different term (being a term that does not include the specification of a proportion of the loading amount attributable to a relevant entitlement).

38. While proposed section 545A provides a court with a set of options to determine a reduction amount in proportion to a loading amount already paid to an employee to avoid the circumstances where an employer effectively pays twice for a relevant entitlement, there is no proportionate conversion of a loading amount into a relevant entitlement for circumstances where an existing employee may claim the relevant leave or absence entitlement, rather than a payment. These circumstances are likely to be limited, but if claimed, it is not clear that the employer could require an employee to 'pay back' amounts of loading in proportion to the granted leave or absence.

Part 2 of Schedule 1, item 7

39. The Law Council notes that the reference to definition of 'long term casual' at Part 2 of Schedule 1 (item 7) appears incorrect. The definition in the Fair Work Act to be repealed is the definition of 'long term casual employee'.

40. Further, the substitution of 'regular casual employee' for 'long term casual employee' for the purposes of requesting flexible working arrangements (section 65) and access to parental leave and other entitlements (section 67) may result in confusion about how the reference in that definition to employment 'on a regular and systematic basis' is to be applied in the context of:

    (a) the reference to 'a sequence of periods of employment' in paragraphs 65(2)(b)(i) and 67(2)(a); and

    (b) the retention in paragraphs 65(2)(b)(ii) and 67(2)(b) of the words 'has a reasonable expectation of continuing employment by the employer on a regular and systematic basis'.

41. The Law Council notes the similarities between the concepts used in section 15A of 'continuing and indefinite work' and an 'agreed pattern of work' and, respectively, a 'reasonable expectation of continuing employment' and 'a regular and systematic basis' in sections 65 and 67 of the FWA. It is arguable that a firm offer of casual employment that includes 'regular and systematic work' combined with 'a reasonable expectation of continuing employment' might be confused with a firm advance commitment to continuing and indefinite work according to an agreed pattern of work' as set out in proposed section 15A.

Schedule 2 - Modern Awards

Simplified additional hours agreements – Part time employees

42. Proposed Division 9 would create the capacity for an employer and employee to enter into a simplified additional hours agreement (**SAHA**). Pursuant to such an agreement, a part-time employee covered by one of 12 Awards (or any further Awards later added by Regulation) who is engaged to work at least 16 hours a week can agree that they may, in addition, work additional hours on another day and if worked, those hours will not attract overtime rates of pay.

43. This measure will see an individual agreement (contract) override Award provisions that require overtime to be paid where a part-time employee is requested to work hours above their contracted hours.

44. Part time workers often choose part time work with fixed hours so as to permit them to engage in other activities, such as caring responsibilities or study commitments, that would clash with full time work.

45. The Law Council is concerned that appropriate safeguards be in place to protect vulnerable workers from being employed on the basis that they are employed for set hours (for example, two eight hour days per week) but with an expectation that they also make themselves available when required on other days. Such a development would be contrary to the stated intention of the provisions, as it would partly casualise work.

46. It is noted that an employee must agree to such a provision, and an employee that enters into a SAHA can terminate it on seven days' notice. The provisions could be

improved by making clear that an employer cannot insist on a SAHA as a condition of employment or maintaining employment.

47. Consideration might also be given to amending proposed section 168Q to make clear that a part-time employee has the right to elect not to work any particular period of 'additional agreed hours' set out in the agreement.

Reasons for inclusion in the Fair Work Act

48. While the Law Council understands the context for SAHAs in the hospitality and retail sectors, the rationale for including these types of agreements in the Fair Work Act rather than under a relevant award remains unclear. The Law Council is aware that complexity in Awards is an issue, however, the Government must also be conscious of not making the Fair Work Act overly complex as well.

49. The Explanatory Memorandum outlines the need for these types of agreements. However, it is silent on why the rules are not able to sit under an award. The Law Council suggests that the Explanatory Memorandum should at least address this point.

Complexity of the provisions

50. Despite being nominally 'simplified', the SAHA provisions tend to increase, rather than reduce, the complexity of the task of understanding and applying the relevant award obligations. It is submitted that while the steps for entering into a SAHA are simple, the interaction between these provisions and award entitlements is not.

51. As is appropriate, the Bill preserves many obligations and entitlements with respect to overtime and the hours of work which remain in effect and operate alongside the SAHA (or example, proposed subsections 168Q(3) and 168P). This, however, creates complexity and a real risk that employees will not understand the effect of the agreement, especially the entitlements which are being given up and those which remain as this will depend on the instrument which applies.

52. In addition, the Fair Work Ombudsman could be required to produce a general information statement to be given to an employee before a SAHA comes into effect. This information statement could set out, in general terms, the obligations and entitlements that continue to operate alongside the SAHA.

53. The formal requirements of the SAHA are, in contrast to its legal effect, indeed 'simple'. All that is required is that the SAHA identify the additional agreed hours and be entered into before the start of the first such period.[9] The employer must also inform the employee that the agreement is a SAHA, but there is no requirement that the agreement be in writing (although, if not in writing, a record of the agreement must be made). The Law Council considers that the inclusion of a requirement that a SAHA be in writing and signed by the employee would not add undue complexity or regulatory burden, and is reasonable to protect the interests of both parties and avoid disputes.

54. Further, the Law Council is of the view that a written SAHA should be required to include a statement which explains the employee's workplace rights as clarified in proposed section 168T (entering, not entering and terminating a SAHA are

[9] Ibid s 168N.

workplace rights) and the SAHA should not commence until at least 7 days from the employee being given a copy of the proposed SAHA.

55. Finally, section 168N provides that the SAHA is to be recorded in writing but does not require the employee to agree in writing. Nor is there a requirement to provide the employee with a copy of the SAHA. The absence of a requirement for written agreement may lead to disputation as to whether employee has actually agreed. For any SAHA that is of an ongoing nature, (i.e. not one that covers only a single specific day), consideration might be given to requiring the employer to provide the employee with the record of the SAHA.

Specific Drafting Comments

56. Proposed paragraphs 161A(2)(b) and (c) provide for a determination to be made on application by employer, employee or organisation to whom Modern Award applies. This means those covered by an Enterprise Agreement could not make such an application. However, such persons may have an interest in the Award that covers them, and which would apply if the enterprise agreement ceased to have effect. It may be better to alter the word 'to which the award applies' to read 'who are covered by the award'.

57. Proposed subsection 168N(6) refers to the SAHA having effect until withdrawn, while section 168R refers to termination. Consideration might be given to making the language consistent.

58. Proposed subsection 168Q(1) as drafted does not make it clear whether a SAHA could reduce the minimum requirements of any break period in Modern Award (for example, a 10 hour break before recommencing). This should be clarified in the Bill.

Part 2 - Flexible work directions

General comments

59. The Law Council supports the proposed sections in the Bill relating to flexible work directions. However, the Law Council suggests that they be amended to narrow the eligibility of an employer to issue such directions, and the potential duration of the directions.

60. Proposed sections 789GZG, 789GZH and 789GZI have the potential for significant impact, as they permit an employer to direct an employee to perform duties they were not engaged to perform at a location they were not engaged to work from for up to two years. Although there is a requirement at section 789GZJ that the flexible work direction be reasonable in the circumstances, and at section 789GZK that the direction be a 'necessary part of a reasonable strategy to assist in the revival of the employer's enterprise', these sections are open to broad interpretation. The Law Council suggests that, given the potential impact of these provisions, amendments be made to the Bill to ensure that the scope and duration of flexible work directions are directly linked to changes arising from the enterprise's operations due to the COVID-19 pandemic.

61. Specifically, questions can legitimately be raised as to whether an employer should be able to require an employee to work from their home. In this regard, it is noted that such a direction does not apply if the direction is unreasonable in all the circumstances as per proposed section 789GZJ. The note after the proposed section identifies a direction might be unreasonable depending on the impact the direction might have on caring responsibilities. However, there are other matters that

could be identified, including whether it is practical to work from home given others who live in that location, whether it is permitted under the terms of any lease, and whether the individual has the personal capacity and practical capacity to do the work in question from home.

62. These matters would be addressed if an employee could refuse a request that they subjectively consider unreasonable. However as drafted, 'reasonableness' is to be determined objectively. In the absence of any arbitration powers, a dispute as to whether a direction was unreasonable would presumably only be determined by an application to a Court for a declaration as to rights. This is clearly impracticable for many employees.

63. A solution would be to permit a dispute about flexible work directions to be capable of arbitration by the FWC as is the case in the current JobKeeper framework. It is noted that proposed subsection 789GZI(2) provides that a flexible work direction has effect subject to an order made by the FWC, although it is unclear as to what power the FWC has to exercise to make such an order, since the power the FWC has to deal with disputes is that found in the dispute resolution terms in modern awards, which does not extend to a power to arbitrate unless the parties agree to arbitration.

Specific drafting comments

64. The Law Council questions the use of the words 'are safe' without any limitation in proposed sections 789GZG and 789GZH, as they arguably provide for an unachievable absolute. It is submitted that consideration be given to reflecting language in work health and safety legislation to 'ensure health and safety so far as reasonably practicable'.

65. In respect of s 789GZH, the Law Council suggests that it is not clear who assesses whether the premises are 'suitable'. Where the place is a worker's home, there should be an element of reasonableness including whether it is consistent with person's lease, family arrangements and other factors. While section 789GZJ provides for it to be reasonable in all the circumstances, the only example referenced example is carer duties. Consideration should be given to broadening examples and protections.

66. In relation to proposed section 789GZK, the Law Council considers the term 'revival of employer's business' to be ambiguous and open to disputation. Further, a business might not need to be 'revived' (in the sense that it is not doing well), but a direction might nevertheless be appropriate, at least for a short period, for example because it is located an area where there have been recent COVID-19 cases and the employee interacts with members of the public.

67. In respect of proposed section 789GZL, the Law Council considers that three days' notice to be unduly short and may not be reasonable given the potential impacts of a direction. Consideration might be given to a longer period other than in exceptional circumstances (for example, emergent circumstances), or alternatively provide that the period must be reasonable in all the circumstances.

68. The Law Council notes that proposed paragraph 789GZL(1)(c) permits for consultation with a representative of an employee, without making clear whether that such a representative must be is someone that the employee has nominated to represent them. This should be clarified in the Bill.

69. In respect of proposed paragraph 789GZP(2)(b), the Law Council refers to its comments above regarding section 161A and the suggestion that the right to make

an application might extend to those covered by the award, not just those in respect of whom the award applies.

Flexible work directions

70. The Queensland Law Society (**QLS**) has indicated it supports the Government's intention regarding flexible work directions in Modern Awards as outlined in Part 2 of Schedule 2 of the Bill. However, it queries whether the creation of a 'deemed award term' may lead to unintended consequences. This Part will mean that the Fair Work Act deems certain terms of an Award (as opposed to, for example, Part 2-3 which provides for what can and cannot be in Awards, rather than deeming specific terms). In the view of the QLS, specific terms of an award should remain a matter for determination by the FWC, rather than prescription by statute. The QLS therefore recommends that proposed subsection 789GZO(2) be amended so that the FWC may vary a term under this part in an award, where appropriate.

Schedule 3 – Enterprise agreements etc.

Better off overall test

71. The Bill broadly proposes to amend the application of the better off overall test (**BOOT**) test so that it:

    (a) limits the FWC's ability to consider patterns or kinds of work to only those currently engaged in by award covered employees for the agreement, or are in any case reasonably foreseeable at test time;

    (b) allows the FWC to have regard to the overall benefits (including non-monetary benefits) an employee would receive under the proposed agreement compared to the relevant; and

    (c) requires the FWC to consider the views of employees and employers covered by the agreement about whether it passes the BOOT.

72. Specifically, Schedule 3 of the Bill would repeal current subsections 180(2) and 180(3) in the Fair Work Act, which contain the requirements an employer must comply with before requesting that employees vote to approve a proposed enterprise agreement. The Bill would insert new subsections 180(2) and 180(3), which are less prescriptive, and require an employer to take reasonable steps to ensure that relevant employees are given a 'fair and reasonable opportunity to decide whether or not to approve the proposed agreement'. Proposed subsection 180(3) sets out some examples of 'reasonable steps', without limiting proposed subsection 180(2). It is important that employees are properly informed as to the terms of the agreements they are making and there are appropriate protections in place to enable employees to vote. In this regard, the Law Society of New South Wales has informed the Law Council that it is of the view that insufficient justification has been provided for repealing and replacing the pre-approval requirements that are currently in the Fair Work Act.

73. The Bill also includes an additional provision (to sunset automatically two years from commencement) allowing FWC to approve an agreement that did not pass the BOOT where it is not contrary to the public interest and it is appropriate to do so taking into account all the circumstances, including:

(a) the views of the employees, employers and bargaining representatives for the agreement;

(b) the circumstances of those employees and employers and any employee organisations (for example, unions) covered by the agreement, including the likely effect that approving or not approving the agreement would have on them;

(c) the impact of COVID-19 on the enterprise to which agreement relates; and

(d) the extent of employee support for the agreement as expressed in the outcome of the vote to approve the agreement.

74. There has been a large amount of controversy regarding this provision. It has been correctly noted that such a provision would permit an agreement to be made that would cause employees to be paid less than they would under an Award. However, such an outcome would only occur where FWC is satisfied that it is in the public interest to approve such an agreement, having regard to all the listed factors above. Given that the Commission would be exercising a discretion that would take into account, amongst other matters, the views of employees and the impact the agreement if made would have on them, it can be accepted that the 'umpire' will have the capacity to only approve agreements that undercut an award where it is appropriate to do so. Such a protection is not insignificant.

75. The Law Council considers that concerns would be further alleviated if the provisions that undercut an Award only applied for a limited period. It is noted that an agreement that is approved over the two year period continues to have effect for the life of the agreement. That might be four years, and thereafter it would continue to have effect until replaced or terminated. Consideration might be given to a provision that ensures that, to the extent the agreement provides conditions that would not meet the BOOT, such provisions cease to have effect after a set period of time.

76. In this regard it should be borne in mind that it is not only employees who are potentially negatively affected by an agreement that permits an employer to pay less than the award. Competitors of that business, who do have to pay award rates, will find their capacity to compete is reduced, and may lose contracts or tenders as a result – an outcome that has greater significance the longer that the relevant provisions of an agreement are permitted to apply.

Voting requirements

77. The Bill proposes to amend the Fair Work Act to provide certainty as to when casual employees are entitled to vote on an agreement. It would provide that a casual employee may vote to approve an agreement if they performed work at any time during the access period.

78. The current statutory provisions create practical difficulties when determining which casual employees can vote to approve an agreement.[10] The proposed change has the advantage of creating certainty. However, the proposed change does create the potential for an employer to manipulate the voting pool by determining who to roster during the access period. Consideration might be given to provisions that would prevent such manipulation.

[10] See *National Tertiary Education Union v Swinburne University of Technology* [2015] FCAFC 98.

How the FWC may inform itself when considering enterprise agreements

79. Proposed subparagraph 254AA(2)(c)(iv) in the Bill would have the effect of preventing the FWC from receiving submissions, evidence or information from a union that is not a bargaining representative for the enterprise agreement under consideration, unless the FWC is satisfied there are exceptional circumstances.

80. In certain instances, a union with coverage of, and insight into, an industry will not be a bargaining representative for the enterprise agreement, for example when the enterprise agreement covers small groups of employees, none of whom are union members. The Law Council suggests that this provision be reconsidered, given that unions commonly have significant technical understanding of an industry and can provide relevant information. Given the potential absence of any other contradictor, it might be considered appropriate that unions continue to be able to be heard as to whether an agreement ought to be approved without first having to establish there are 'exceptional circumstances'. Preventing the FWC from considering such submissions may prolong its consideration of an application unnecessarily and lead to further litigation.

Exemption to transfer of business

81. Schedule 3, Clause 62 of the Bill proposes the insertion of subsection 311(1A) into the Fair Work Act, which would provide as follows.

> *(1A) However, there is not a transfer of business if:*
>
> *(a) the new employer is an associated entity of the old employer when the employee becomes employed by the new employer; and*
>
> *(b) before the termination of the employee's employment with the old employer, the employee sought to become employed by the new employer at the employee's initiative.*

82. The Explanatory Memorandum accompanying the Bill notes that this proposed amendment:

> *… will limit rights in work in circumstances where the new employer's industrial instrument has terms and conditions that are less favourable than the old employer's instrument. Conversely, rights in work will be promoted where the new employer's industrial instrument has terms that are more favourable than the old employer's instrument.*[11]

83. Due to the potential limitation on an employee's rights, the Law Council is of the view that the exemption at proposed subsection 311(1A) of the Bill should not apply simply because an employee sought to become employed by the new employer. An employee might 'seek' such employment in circumstances where they have little alternative choice. Instead, the exemption should be narrowed so as to only cover circumstances where:

(a) the employee seeks employment with the new employer and the new employer recognises prior continuous service with the old employer;

[11] Explanatory Memorandum (Human Rights Compatibility Statement), Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020, cx.

(b) the old employer pays the employee all entitlements otherwise arising in the circumstance of redundancy; and/or

(c) the new employer's industrial instrument has terms that are more favourable than the old employer's instrument.

Part 13 - Sunsetting of instruments

84. Part 13 of the Bill will bring to an end so-called 'zombie agreements' on 1 July 2022, namely Australian workplace agreements, enterprise agreements and other instruments made before the Fair Work Act commenced which continue to apply because they have not been terminated.

85. The Law Council welcomes this change which is intended to put an end to employees receiving rates and allowances below (in some cases well below) the relevant modern award. The Law Council suggests consideration be given to two further related amendments:

(a) First, it would be appropriate that employers be required to give affected employees at least three months' notice that an instrument is to end, and the effect that will have on their terms and conditions. This will allow time for employees to alter their circumstances and where appropriate engage in negotiations for a replacement instrument or agreement with their employer.

(b) Second, consideration should be given to create a mechanism that would allow the FWC to hear any application that might arise to address unanticipated adverse consequences. In that regard, it is possible that some employees would be worse off due to such an agreement being terminated. Further, members of the Law Institute of Victoria have identified that the removal of such agreements may have consequences for the Australian horticultural sector, which will be compounded by the lack of overseas labour as a result of the COVID-19 pandemic.

Schedule 4 – Greenfields agreements

86. The Bill has as part of its purpose to assist Australia's economic recovery from the COVID-19 pandemic. As major projects are considered a key part of Australia's recovery from the economic impact of COVID-19, amendments to the Fair Work Act have been proposed which are aimed at reducing the risk of Greenfields Agreement expiring during the construction of a major project.

87. When Greenfields Agreements expire during construction, the result is uncertainty for investors by potentially exposing parties to delays due to negotiations for a new Agreement and exposure to industrial action.

88. The amendments outlined below have been introduced with the aim to better attract investment into major projects within industries such as construction, mining, infrastructure, and oil and gas production.

Definition of Major Projects

89. The Bill proposes to insert at the end of Division 4 Part 1-2 of the Fair Work Act a definition of 'major project'. A 'major project' will be taken to mean 'expenditure of a capital nature that has been incurred, or is reasonably likely to be incurred, is at least $500 million.'

90. If this threshold cannot be met, then the Minister may make a declaration that the project is a major project. In order for such a declaration to be made, the Minister must be satisfied that the total expenditure of a capital nature that has been incurred, or is likely to be incurred, in carrying out the project is at least $250 million but less than $500 million. Additionally, the Minister must take into account:

    (a) the national and regional significance (if any) of the project;

    (b) the contribution the project is expected to make to job creation; and

    (c) any other matter the responsible Minister considers relevant.

Amendments to the Nominal Expiry Date

91. Currently, section 186 of the Fair Work Act outlines general requirements for when the FWC must approve Greenfields Agreements. One such requirement is that the Agreement must specify a nominal expiry date which is not more than 4 years after the day on which the FWC approves the agreement.

92. Clause 3 of the Bill proposes to repeal paragraph 186(5)(b) of the Fair Work Act and insert a new section which will mandate that for Greenfields Agreements, the nominal expiry date must not be more than 8 years after the day the Agreement came into operation.

93. For all other agreements, the nominal expiry date will remain at 4 years after the day on which the FWC approved the agreement.

Additional Approval Requirements

94. The Bill will also amend section 187 of the Fair Work Act by adding an additional approval requirement on agreements that:

    (a) are a Greenfields Agreement;

    (b) relate to a major project; and

    (c) specify a nominal expiry date more than 4 years after the day on which the FWC approves the agreement.

95. While extending the maximum nominal expiry period to 8 years has the benefit of creating certainty, it does mean that there is an extended period during which employees cannot take industrial action or otherwise take steps to seek alternative terms to meet changed circumstances.

96. That concern is alleviated to some extent by the fact that the Agreement will need to provide for at least an annual increase of the base rate of pay payable to each employee who will be covered by the agreement to occur on or before each day that is the anniversary of the day on which the agreement comes into operation and that occurs before the nominal expiry date of the agreement.

97. However, the Law Council remains concerned that for the extended period there may be no ready method for disputes to be dealt with as to conditions of employment (as against rates of pay) that might arise due to changed circumstances. Over such a long period it is quite possible for changes to occur in respect of matters not contemplated by the agreement, as has occurred in the last year in respect of working from home, and it would be appropriate for there to be some mechanism to allow such matter to be considered and determined.

98. That concern would be alleviated if the Fair Work Act provided that any agreement that has a nominal expiry date of more than 4 years must provide a right of arbitration. This would allow the FWC, as the umpire, the right to determine any dispute that arises during the life of such an agreement.

Schedule 5 - Compliance and Enforcement

99. Schedule 5 of the Bill provides for a number of discrete matters:

    (a) an increase in civil penalties for types of contravention identified as remuneration-related contraventions, and sham contracting;

    (b) an increase in the monetary limit of the small claims jurisdiction, and the possibility of referral of a matter to the FWC for conciliation, and, if agreed, arbitration;

    (c) a prohibition on advertising a job specifying a rate of pay less than the national minimum wage;

    (d) improving the effectiveness of the regime of compliance notices, infringement notices and enforceable undertakings available to the Fair Work Ombudsman and Australian Building and Construction Commission as alternatives to court action; and

    (e) a new criminal offence for the dishonest and systematic underpayment of employees by employers.

Increased civil penalties

100. Part 1 of Schedule 5 of the Bill increases the maximum civil penalties in respect of remuneration-related contraventions. It inserts a definition of 'remuneration-related contraventions' into the dictionary, picking up on the relevant types of contravention listed in the table in subsection 539(2) of the Fair Work Act, and where those types of contravention might include matters not related to remuneration, defining the subject matters of the relevant contraventions.

101. The Bill then increases the maximum penalties payable in respect of those contraventions by 50 per cent (for nonserious contraventions - it makes no change to maximum penalties for serious contraventions). It also provides for a new means of calculating an alternative maximum penalty, which maximum penalty is two or three times the value of the benefit derived by the employer from the contraventions (depending whether the contraventions is a non-serious, or a serious, contravention). This maximum penalty is only applicable to corporations which are not small businesses. And the penalty paid in these circumstances is only payable to the Commonwealth (presumably because of the likely size of the penalty).

102. Part 5 of Schedule 5 increases the maximum civil penalties for sham contracting contraventions by 50 per cent.

Small Claims Jurisdiction

103. Part 2 of Schedule 5 to the Bill makes several changes to the small claims jurisdiction. First, it increases the jurisdictional limit from $20,000 to $50,000. Second, it requires the Court to consider whether it is appropriate to refer the small claims to the FWC for conciliation. If a matter which is referred to the FWC for conciliation does not resolve, the FWC may arbitrate the matter but only where the

parties agree. An appeal to a Full Bench of the FWC is available in respect of an arbitrated decision.

104. Currently, small claims have to be brought before the Federal Circuit Court. That Court is under-resourced and as a result such claims are significantly delayed. The Law Council welcomes the proposal for the Court to have the power to refer small claims proceedings of up to $50,000 to the FWC for conciliation.

105. The FWC processes for unfair dismissal claims are a useful guide to the effectiveness of conciliation as a means of resolving employment-based litigation. The FWC's Annual Report for 2018-19 identifies that:

- 78 per cent of matters were resolved by way of staff conducted conciliations; and
- the average period to conclude conciliations was 32 days.

106. If such processes were made available for small claims proceedings and appropriately resourced, there is no reason similar timeframes and results could not be achieved.

107. While the capacity to refer such claims to the FWC is welcomed, the capacity of the FWC to resolve claims would be further enhanced if the FWC could not only conciliate but also arbitrate such claims (other than with the permission of the parties). Recalcitrant employers who are refusing to pay wages due are unlikely to be affected by a system that obligates them to attend a conciliation but does not contain the power to require them to pay.

Criminalising Underpayments

108. Part 7 of Schedule 5 of the Bill provides for a new offence of dishonest and systematic underpayment. The proposed subsection 324B(1) provides for the offence as follows:

> *An employer commits an offence if the employer dishonestly engages in a systematic pattern of underpaying one or more employees.*

109. The Law Council notes that there is no definition of systematic pattern. However, proposed subsection 324B(5) does provide a non-exhaustive list of matters a court may have regard to in determining whether an employer has engaged in a systematic pattern, including the number of underpayments, the period of time of the underpayments, the number of employees affected and any response to complaints.

Amendments to section 26 of the Fair Work Act and the Queensland Criminal Code

110. The Bill proposes amendments to section 26 of the Fair Work Act to clarify the Act's interaction with state and territory industrial laws in relation to underpayments and 'records offences' for national system employers and national system employees:

> *(da) a law of a State or Territory providing for an employer, or an officer, employee or agent of an employer, to be liable to be prosecuted for an offence relating to underpaying an employee an amount payable to the employee in relation to the performance of work.*

111. The Explanatory Memorandum, at paragraph 404, states:

[p]aragraphs 26(2)(da) and (2)(db) confirm that State or Territory laws that criminalise underpayment or record-keeping failures by national system employers in relation to their employees, but not general criminal laws of theft or fraud, are intended to be excluded. (emphasis added)

112. The Law Council notes that last year, the Queensland Parliament passed legislation to amend the offence of stealing in the Queensland Criminal Code to explicitly capture the underpayment of wages by an employer.[12] An amendment was also made to the fraud offence in section 408C to provide that an offender is liable to 14 years imprisonment if the offender is or was an employer of the victim. The relevant stealing offence provisions are:

(a) Section 391 'Definition of stealing' which was amended to include:

"(6A) For stealing that is a failure to pay an employee, or another person on behalf of the employee, an amount payable to the employee or other person in relation to the performance of work by the employee—

(a) the amount is a thing that is capable of being stolen; and

(b) subsection (6) does not apply; and

(c) the amount is converted to the person's own use when—

(i) the amount becomes, under an Act, industrial instrument or agreement, payable to the employee or to the other person on behalf of the employee; and

(ii) the amount is not paid.

(7) In this section—

"Act" includes an Act of another State or the Commonwealth.

"industrial instrument" means-

(a) an industrial instrument under the Industrial Relations Act 2016 schedule 5; or

(b) a fair work instrument under the Fair Work Act 2009 (Cwlth).

(b) Section 398 'Punishment of Stealing, Punishment in special cases', which was amended to include:

16 Stealing by employers

If the offender is or was an employer and the thing stolen is the property of a person who is or was the offender's employee, the offender is liable to imprisonment for 10 years.

(c) Section 408C 'Fraud' which added, to subsection (2) that the offender is liable to imprisonment for 14 years if, for an offence against subsection (1)—

(e) the offender is or was an employer of the victim.

[12] *Criminal Code and Other Legislation (Wage Theft) Amendment Act 2020* (Qld).

113. As it stands, it is not clear whether:

    (a) the effect of the amendments to section 26 will be that the operation of the relevant provisions of the Queensland Criminal Code (extracted above) will be excluded where this conduct involves national system employers and national system employees, which the Law Council understands to be a significant portion of the workforce; or

    (b) whether these provisions are 'general criminal laws of theft and fraud', despite specific elements relating to employers and employers.

114. If the intent of the reforms is to exclude the Queensland offence provision, it may be that a national system employer's conduct does not meet a 'systematic pattern of underpayment' but that they cannot be prosecuted under the Queensland offence provisions, because of the amended section 26 of the Fair Work Act. The drafting in the Bill should be clarified so that there is certainty for employers and prosecuting agencies.

Schedule 6 - The Fair Work Commission

115. The Bill includes five amendments to Schedule 6, which deals with the FWC. Pursuant to the proposed new section 587, the FWC can dismiss an application at any stage in dealing with a matter if the FWC is satisfied that the application is frivolous, vexatious, misconceived or lacking in substance, or has no reasonable prospects of success, or is otherwise an abuse of FWC processes. An application cannot be dismissed unless the applicant is given a reasonable opportunity to make submissions in relation to whether the application should be dismissed.[13]

116. All of the above can be done by the FWC's initiative or on application. It is made clear that the FWC power to dismiss an application for others is not limited by this new subsection, but rather, is enhanced by it. Further, proposed section 587A would enable the FWC to order a person whose application has been dismissed in accordance with section 587 not to make a subsequent application to the FWC of a kind(s) specified in the order, without permission of an FWC presidential member. This ensures that the FWC does not have to continue to deal with applicants to demonstrate a 'pattern of initiating unmeritorious proceedings'.

117. While the grounds upon which the FWC may dismiss an application have been broadened, they are still tests with high thresholds. For example, to establish an application is an abuse of process or frivolous and vexatious requires difficult and specific tests to be met that require evidence.

118. Consideration should be given to providing the FWC with more discretion through wording such as not 'in the public interest', as is contained at paragraph 27(1)(a) of the *Industrial Relations Act 1979* (WA). This provision is set out below:

    Section 27(1)(a):

    At any stage of the proceedings [the Commission may] dismiss the matter or any part thereof or refrain from further hearing or determining the matter or part if it is satisfied -

    (i) that the matter or part thereof is trivial;

[13] Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 s 587(2)(b).

(ii) that further proceedings are not necessary or desirable in the public interest; or

(iii) that the person who referred the matter to the Commission does not have a sufficient interest in the matter; or

(iv) that for any other reason the matter or part should be dismissed or the hearing thereof discontinued, as the case may be.